	)	**DEATH PENALTY**
	)	
IN THE SUPREME COURT OF THE	)	**CASE NO. S102401**
	)	
STATE OF CALIFORNIA	)	Related to Cases:
	)	Direct Appeal No.
	)	S020161
	)	Habeas Corpus No:
In re	)	S076438
TAUNO WAIDLA,		[Los Angeles Superior Court Case No. A711340]
Petitioner,		

On Habeas Corpus.

PETITIONER'S TRAVERSE TO RESPONDENT'S RETURN TO THE PETITION FOR WRIT OF HABEAS CORPUS

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Petitioner Tauno Waidla, by and through his counsel of record, submits this Traverse to Respondent's Return to the Petition for Writ of Habeas Corpus, alleging as follows:

DENIAL OF ALLEGATIONS IN RETURN

Petitioner responds to the allegations in Respondent's Return as follows:

On page 6 of her Return, Respondent alleges that the prosecutor's arguments during the Waidla and Sakarias trials were separated by more than nine months. Petitioner admits this allegation.

On page 7-8, Respondent alleges "the Sakarias statement would not have been admissible at Petitioner's trial." Petitioner denies this allegation.

On page 8, Respondent alleges "Sakarias was a 'full partner in crime' whether he inflicted any of the chopping wounds or not." This statement is not a factual allegation. Rather, it is argument regarding the proper characterization of Sakarias's roll in the crime. Petitioner states that, to the extent the description of Sakarias as a "full partner in crime" implies that Petitioner was equally culpable, Petitioner denies this allegation.

On page 8, Respondent alleges "the admission/statement made by each defendant would not have been admissible at the trial of the other defendant." Petitioner denies this allegation.

On page 8, Respondent alleges "the prosecutor's inconsistent argument regarding the hemorrhagic chopping wound was inadvertent." On information and belief, Petitioner denies this allegation.

On page 8, Respondent alleges "the 'fatal blows' included the blunt force impacts and stabbing wounds, as well as the hemorrhagic chopping wound." On information and belief, Petitioner denies this allegation.

On page 8, Respondent alleges that "subsequent to Drake, the 11th Circuit held a prosecutor is entitled to argue inconsistent theories." This statement is not a factual allegation. Rather, it is a legal argument.

On page 9, Respondent alleges that "to the extent a due process violation can be predicated upon a mere inconsistency of theories, relief is not warranted unless the Petitioner can establish the inconsistency was 'fundamental' and the theory used against him was false." This statement is not a factual allegation. Rather, it is a legal argument.

On page 10, Respondent alleges "Petitioner was an actual killer without regard to the sharp-edged chopping wounds since Petitioner admitted that he personally struck the victim with the blunt side of the hatchet and Dr. Ribe opined that the victim died from a combination of traumatic injuries, including the blunt force impacts." Petitioner denies this allegation.

On page 10, Respondent alleges that "even if Petitioner was not an actual killer, his intent to kill was evident from the fact that he armed himself with a hatchet and struck the victim with it when she entered her front door." Petitioner denies this allegation.

On page 10, Respondent alleges "any inconsistency could not have affected Petitioner's murder conviction since Petitioner admitted he initiated the attack by striking the victim with the blunt end of a hatchet when she entered the front door of her home as it was being burglarized by Petitioner and Sakarias." Petitioner denies this allegation.

On page 10, Respondent alleges "the victim died from a combination of the blunt force impacts, stabbing wounds, and the hemorrhagic chopping wound." Petitioner denies this allegation.

On page 10, Respondent alleges that "the prosecutor consistently argued in both trials that Petitioner was responsible for the blunt force impacts and that Sakarias was responsible for the stabbing wounds." Petitioner denies this allegation.

On page 11, Respondent alleges "the prosecutor's argument relied upon Petitioner' s own admission that he armed himself with a hatchet that he took from the Piirisilds' cabin in Crestline and repeatedly struck her with the blunt end as soon as she entered her home in North Hollywood." To the extent this

statement implies that the prosecutor relied entirely on the allegations described, Petitioner denies this allegation.

On page 11, Respondent alleges that "the premeditation/deliberation theory was rendered superfluous since the jury found the robbery-murder and burglary-murder special circumstances true." Petitioner denies this allegation.

ORDER TO SHOW CAUSE
QUESTION ONE:

The prosecutor presented false evidence and argument, and presented facts inconsistent with those presented at a subsequent trial.

I. INTRODUCTION

The prosecutor knowingly presented false argument and misleading evidence to the jury at Petitioner's trial.[1] The prosecutor repeatedly asserted that Petitioner delivered **all** of the hatchet blows on the victim, Viivi Piirisild: "It is Tauno Waidla who chose to be here with each swing of the hatchet to Viivi Piirisild's head and face and neck with both the blunt and the sharp side of the hatchet. It is [with] those swings that he chose to be here and he chose to be judged." (RT 3059. See also RT 548-549, 2831, 2837, 2840, 2843.)

This argument was false. The prosecutor was aware of codefendant Peter Sakarias's confession which stated facts to the contrary. In that confession, Sakarias admitted that he hit Piirisild twice on the top of her head with the hatchet. (People's Exhibit 149 to Sakarias Trial, attached hereto as Exhibit A.) Sakarias's admission that he struck Piirisild **on the top** of her head is of particular significance. Petitioner stated that he struck Piirisild with the blunt

[1] Petitioner first raised this claim in his direct appeal. On January 13, 2000, Petitioner's prior state habeas attorney filed a Motion to Consolidate Pending Appeal and Habeas Corpus Proceedings and to Issue an Order to Show Cause. On January 25, 2000, this Court denied Petitioner's motion. Then, on April 6, 2000, this Court denied both Petitioner's direct appeal and his habeas petition.

side of the hatchet only. The blows to the top of the head were administered with the **sharp** side of the hatchet. It was one of these blows that the prosecution characterized as the "death blow." (RT 3070.) At Sakarias's trial, the prosecutor (Steven Ipsen, the same prosecutor as in the Waidla trial) relied on Sakarias's statement that he hit Piirisild with the hatchet.

Mr. Ipsen's allegation that Petitioner alone attacked Piirisild with the hatchet prejudiced Petitioner at the penalty phase.[2] (See Eddings v. Oklahoma (1982) 455 U.S. 104, 110-112 [sentencing jury should consider "any of the circumstances of the offense . . . as a basis for a sentence less than death"].)

[2] To further corroborate his assertion that Mr. Ipsen knowingly presented false evidence and argument, Petitioner filed with this Court a letter Peter Sakarias sent to Eric Multhaup, Petitioner's prior state habeas attorney. In his letter dated September 7, 1999, Mr. Sakarias confirmed the following facts, which not only exculpate Petitioner from the deadly attack on Mrs. Piirisild, but raise doubts about Petitioner's eligibility for a felony murder conviction: (1) Petitioner did not kill Mrs. Piirisild, Mr. Sakarias did; (2) Petitioner lacked the intent to hurt her; (3) Petitioner pleaded with Sakarias to leave the Piirisild home before Mrs. Piirisild returned home; (4) soon after Mrs. Piirisild entered the living room, she took control of the hatchet from Petitioner and appeared to have subdued him by wrestling Petitioner to the floor; (5) Mrs. Piirisild was alive and conscious when Petitioner had his last contact with her; (6) Petitioner appeared to be in shock when Mr. Sakarias stabbed and hatcheted Mrs. Piirisild to death; (7) Petitioner never intended to commit robbery, he only sought the car the Piirisild's had promised him for completing home improvement projects in and around their home. Indeed, Petitioner believes great credibility can be assigned to this letter because Mr. Sakarias wrote it while he was (and still is) engaged in active litigation before this Court. (State Exhaustion Petition, Exhibit 9.)

If Petitioner's jury knew that Mr. Sakarias, not Petitioner, inflicted the sharp side hatchet blows to the top of Mrs. Piirisild's head in the bedroom, the outcome of the penalty phase likely would have been different. For it was those sharp-sided hatchet blows broke open her skull and killed her.[3] The jury sentenced Petitioner to death based on the erroneous impression that he, and not Sakarias, dealt the blows to the top of the head.

In her Return, Respondent contends that the prosecutor did not knowingly make false argument regarding Petitioner's exclusive use of the hatchet. (See Return, Exhibit A at paras. 2-3.) The record rebuts this. More than a year before Petitioner's trial, Sakarias confessed to his involvement in the crime, and to hitting the victim twice on the top of the head with a hatchet. The same prosecutor tried both cases, and in the Sakarias trial he relied heavily on Sakarias's admissions. Yet in the interim, during Petitioner's trial, the

[3] In her Return, Respondent states that the prosecutor could reasonably have believed Sakarias inflicted the two postmortem hatchet wounds to the top of Mrs. Piirisild's head. (Return, at pp. 22-23.) However, Respondent ignores the facts. Mr. Ipsen's declaration asserts that "it was logical to infer that whoever inflicted two of the chopping wounds probably inflicted all three." (Return, Exhibit A at para. 5.) In addition, the bedroom crime scene evidence that Ipsen presented to the Sakarias jury through Detective Victor Pietrantoni indicated significant blood spatter throughout the bedroom. (See Sakarias RT 887-9915; People's Exhibits 137-143.) Moreover, both Petitioner and Sakarias said in their custodial statements that Sakarias alone attacked the victim in the bedroom. Indeed, based on all of this evidence, it would have been unreasonable for Mr. Ipsen to conclude that Sakarias only inflicted the two postmortem hatchet chops in the bedroom.

prosecutor conveniently "forgot" that this confession existed. The claim of "inadvertence" does not pass the smell test.

The record on both trials also reveals not "inadvertence" on the part of the prosecutor but a deliberate selection of evidence, of which Sakarias's confession was just a part. For instance, the prosecutor also presented inconsistent evidence at the two trials and these inconsistencies were misleading. The prosecutor presented selected crime scene evidence to Petitioner's jury. The prosecutor entirely omitted from his presentation the bedroom crime scene evidence. Determining where Piirisild was killed is critical for assessing the degree of Petitioner's culpability. Both Petitioner and Sakarias admit to attacking Piirisild in her living room. Both admit that, after she was dragged to her bedroom, Sakarias alone re-entered the bedroom and struck her on the top of the head with the hatchet. At Sakarias's trial, the prosecutor presented extensive crime scene evidence from the Piirisild bedroom demonstrating that the murder occurred in the bedroom, and thus, was committed by Sakarias. At Petitioner's trial, the prosecutor presented no evidence to the jury of the bedroom crime scene. The jury was thus left to conclude (at the urging of the prosecutor) that Piirisild must have been killed in the living room, where she was attacked by both Sakarias and Petitioner.

The record shows a prosecutor gaming the system. It cannot begin to explain how the prosecutor simply "forgot" at Petitioner's trial that Sakarias had confessed to the blow that the prosecutor would later call the "death blow." Petitioner's counsel presented no witnesses at the penalty phase trial, yet Petitioner's jury had to deliberate for almost **nine days** before returning a death verdict. There is more than a reasonable probability that, had the jury known the true circumstances of the crime, Petitioner would not have been sentenced to death.

II. FACTS RELEVANT TO THE CLAIM

A. Mr. Ipsen's False, Misleading, and Incorrect Arguments

1. Who Wielded the Hatchet

a. Petitioner's trial

During his guilt phase closing argument, Mr. Ipsen stressed that it was Petitioner who used the hatchet at all times against the victim. "Mr. Waidla choosing for himself the hatchet, and Mr. Sakarias accepting the lesser implement the knife, which -- with which he was only able to plunge into Viivi Piirisild's body, some six inches. Mr. Waidla choosing the hatchet, the more devastating of the instruments." (RT 2840.) Ipsen also stressed that Petitioner used the sharp end of the hatchet. "As he walked towards the [Piirisild] home, he had with him the hatchet that he would soon thereafter bludgeon Viivi Piirisild to death with, and **chop the top of her head with**." (RT 2831 [emphasis added].) Mr. Ipsen added, "Mr. Waidla contends that he did hit her that one time . . . . [but what he really did was **he turned] the hatchet blade so that it was more effective than its blunt end [and he] was now able to chop through the top of her skull**." (RT 2837 [emphasis added].)

As noted previously, Mr. Ipsen stated that Mr. Sakarias had a knife and referred to it as the "lesser implement." He also stressed that Petitioner exclusively used the hatchet which was "the more devastating of the

instruments." (RT 2840.) In addition, Mr. Ipsen repeatedly referred to Mr. Sakarias merely as Petitioner's "accomplice." (E.g. RT 544, 545, 548, 549, 2177, 2842.)

In his penalty phase argument to the jury, Mr. Ipsen again falsely attributed to Petitioner all the damage done to the victim with the hatchet. He assured the jury that their job deciding life or death "is not an easy task . . . . Just as it was not easy for you to see photographs of her body as it was hatcheted by this defendant." (RT 3057.) However, Mr. Ipsen argued that their task was made easier because "It is Tauno Waidla who chose to be here [on trial] with each **swing of the hatchet to Viivi Piirisild's head and face and neck with both the blunt and the sharp side of the hatchet**. It is [with] those swings that he chose to be here and he chose to be judged." (RT 3059 [emphasis added].)

Mr. Ipsen contended that Petitioner lied when he told the police that Mr. Sakarias had used the hatchet to end Mrs. Piirisild's life. Mr. Ipsen then placed the hatchet in Petitioner's hand for the final, forceful blows that penetrated her skull. According to Mr. Ipsen's argument, Petitioner had "[n]o concern for even his best friend in the world, and if nothing else really sums up Mr. Waidla it is the fact that when he's arrested for the murder which he in fact committed, in which **he felt the blade of the hatchet in Viivi Piirisild's head**, when he

committed that murder . . . he blames his best friend in the world . . . and [said] Peter Sakarias did all of it." (RT 3065-3066 [emphasis added].)[4]

In Mr. Ipsen's final plea to the jury, he argued that Petitioner intentionally used the sharp side of the hatchet to break open Mrs. Piirisild's skull. "Tauno Waidla chose, and I believe this is a critical point in his thought process, . . . Tauno Waidla chose to change the angle of the blade. He found that while her unconscious body lay at his feet that the bludgeoning end of the hatchet, the blunt end, was not sufficient, because it was not carrying out his plan." Mr. Ipsen continued, "Although he felt her head and her flesh against the back of his hatchet numerous times, **he knew his mission wasn't accomplished, and that's when he changed and switched and used the sharp edge of the hatchet to give that death blow**." (RT 3069-3070 [emphasis added].)

[4] C.f. Peter Sakarias's confession and his letter to Eric Multhaup, Petitioner's prior state habeas attorney. (State Exhaustion Petition, Exhibit 9.) In that letter, Mr. Sakarias accepts complete responsibility for killing Mrs. Piirisild.

b. Sakarias's trial

During the guilt phase of Mr. Sakarias's trial, Mr. Ipsen relied on Sakarias's confession and all the crime scene evidence to reconstruct for the jury what happened in the Piirisild home. As set forth below, Mr. Ipsen gave detailed argument regarding Mr. Sakarias's acknowledged use of the hatchet in the bedroom.

During Mr. Ipsen's penalty phase argument at the Sakarias trial, he expanded upon the graphic imagery he developed during the guilt phase with regard to the bedroom assault to which Mr. Sakarias had confessed. Mr. Ipsen did this in a successful effort to prove to the jury that Mr. Sakarias was a remorseless killer who hungered for further violence. With respect to Sakarias's intent to kill, Mr. Ipsen reminded the jury that "Looking at the crime itself, **the repeated use of the knife, repeated use of the hatchet. This isn't a situation where boom, one strike . . . . This is a determined, brutal murder**." (Sakarias RT 2424 [emphasis added].)[5]

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[5] These penalty phase arguments were in addition to Mr. Ipsen's guilt phase arguments, in which he demonstrated Mr. Sakarias's intent to kill.

When he described Sakarias stabbing Mrs. Piirisild many times near her heart, he said "Mr. Sakarias promptly began plunging with a hunger, not a hunger of the stomach, but a hunger of some warped part of his desire, plunging the knife in her body . . . . [A]nd Mr. Sakarias indicated that he plunged the knife in her immediately and didn't stop . . . but continued until the knife handle broke off." (Sakarias RT 1519.)

Mr. Ipsen continued this guilt phase argument when he summarized the

Later, Mr. Ipsen turned to the attack Mr. Sakarias committed in the bedroom. "If, when you walked back to the [bedroom] with that hatchet and thought Viivi Piirisild is still alive, and you must have, otherwise you wouldn't have gone back there with that hatchet, and if you just simply didn't chop the top of her head off, as the evidence indicated you did in that back room, thus finally ending her life." (Sakarias RT 2446-2447.)

Mr. Ipsen added, "So, having murdered once, both by knife and by hatchet, having felt at such close proximity blood that was on your clothing, you had to take off your jeans jacket and hide it so you wouldn't get caught, you so appreciated the criminality of your actions." (Sakarias RT 2449.)

2. Where the Fatal Hatchet Attack Occurred

a. Petitioner's trial – the living room

In Mr. Ipsen's opening argument at Petitioner's trial, he stressed that Mrs. Piirisild was murdered in the living room. "[Mr. Waidla] left her body dead in her home **where she had been killed near the front door**, and he left her where he and his accomplice had dragged her 180, 190 pound body, left next to her bed in the bedroom." (RT 548 [emphasis added].)

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evidence presented; "In this case, we know Mr. Sakarias intentionally killed Viivi Piirisild, both by the circumstances apparent at the scene, the repeated stabbing, repeated hatchet wounds. Not an accidental killing, but an intentional killing." (Sakarias RT 1525-1526.)

During his closing argument, Mr. Ipsen renewed his false contention that Piirisild was killed in the living room.

> **And we know that she was dead in the front room of her home in her living room. We know that she did not live to see or to be dragged back into her bedroom, because the coroner testified and told you that the burn mark on her back, as she was dragged, the abrasion on her back was a postmortem, or an after death wound**.
>
> **At the point that she was dragged into the back room, we know that Viivi Piirisild was already dead by the facts as the coroner testified**.
>
> So, we know it was in that front room that the attack occurred, and that Viivi Piirisild was bludgeoned, chopped and stabbed until life left her body.
>
> We know by the evidence what happened next. Further evidence corroborating the fact, as Mr. Waidla testified to it, and as all the evidence supports, that Mr. Waidla and Mr. Sakarias dragged her body to the back room, had cleaned up to some degree, put the rug over the pool of her blood in the front room, covered her body with draperies and towels.

(RT 2843 [emphasis added].)

b. Sakarias's trial – the bedroom

At Mr. Sakarias's trial, Mr. Ipsen discussed the initial attack in the living room, but emphasized the fact that Sakarias acted alone when he killed Mrs. Piirisild in the bedroom. "We know that based on the physical evidence, the drag marks [on the floor, not on the victim's body], the blood spatter, the location of the Viivi's body when it was finally found by her friend, Bernard

Nurmsen, that she was dragged to the back room, and Mr. Sakarias tells us that also." Mr. Ipsen continued, "Where in the back room she lay for some minutes . . . . [Soon thereafter,] Mr. Sakarias again found himself walking from the kitchen [to the bedroom] with the intent, holding a hatchet in his hand, to strike a few more blows." (Sakarias RT 1520.)

Then, he detailed Mr. Sakarias's attack with the sharp end of the hatchet on Mrs. Piirisild in the bedroom. As for the number of blows to the top of her skull and the force with which these blows were delivered, Mr. Ipsen stated

> We know that there were three, in this series of blows, sharp hatchet wounds to the top of Viivi's head with a tremendous force. We know that based on the testimony of the coroner Dr. Ribe, who indicated that a – the average man, perhaps not the largest man or the smallest, but the average man, it would take almost all of his force to cause the type of damage with even the sharp end of a heavy object of a hatchet to chop off the top of the structure like the skull, because of its nature, it's meant to project our brains, our most vital organ.
>
> And it was with this strength that Peter Sakarias swung this hatchet to penetrate this skull, to reach that most vital organ . . .

(Sakarias RT 1520-1521.)

Mr. Ipsen continued his closing argument at Mr. Sakarias's trial by reviewing the crime scene evidence. In referring to the photographs of the bedroom, he noted,

> We see the swinging of his arm and the blood spatter that goes up along the wall of her bedroom, the ceiling, a few stray

> drops hitting a picture of her and her mother on her dresser, as she kept it neatly, and even behind, on all three surfaces of the room, all four if you count the floor, showing the arc of the hatchet.
>
> * * *
>
> We know that there are in fact three hatchet wounds, the first penetrating the top of the skull, and I know it was the first because it was a hemorrhagic wound, the one in the hairline, the one that chopped the top of her head completely off with the exception of some of the scalp that kept it completely on.
>
> * * *
>
> We know that this last series of chop wounds, which differed from the stabbing and differed from the [bludgeoning] was consistent with the last three blows she received.

(Sakarias RT 1521-1522.)

B. Evidence Presented Regarding The Fatal Hatchet Attack

1. Petitioner's Trial – Living Room

a. Testimony of detective David Crews

Los Angeles Police Department ("L.A.P.D.") Detective David Crews, who investigated the Piirisild homicide with Detective Victor Pietrantoni, described the crime scene to the jury. (RT 1953-2007.) During his testimony he gave an overview of the evidence of the attack. He said Mrs. Piirisild was attacked in the living room and in the hallway leading to the bedroom. Detective Crews relied on many crime scene photographs that were introduced into evidence to explain to the jury where the attack occurred. He did not mention the blood spatter in the bedroom where her body was found.[6]

[6] At Mr. Sakarias's trial, Detective Victor Pietrantoni, not Detective Crews,

b. Testimony of criminalist Susan Johnson

L.A.P.D. Criminalist Susan Johnson also provided testimony regarding the crime scene. Ms. Johnson was assigned to L.A.P.D.'s Comparative Analysis Unit of the Scientific Investigation Division. (RT 1789.) She testified that it was her job to observe and collect blood samples at crime scenes. (RT 1798-1799.) Ms. Johnson added that she worked under the direction of detectives Crews and Pietrantoni who were in charge of the investigation. (RT 1790.)

During Petitioner's trial, she gave detailed testimony of the blood she found in the Piirisild home. This testimony included blood found in the living room, the hallway to bedroom, and on paper towels found in the kitchen garbage can. (RT 1793-1849.) Ms. Johnson did not mention the extensive blood spatter present throughout the bedroom.

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provided extensive testimony of the crime scene. This testimony included the bedroom attack. (Sakarias RT 885-916; People's Exhibits 137-143.)

2. Sakarias's Trial – Living Room and Bedroom

a. Testimony of detective Victor Pietrantoni

During Mr. Ipsen's guilt phase presentation at the Sakarias trial, he relied upon L.A.P.D. Detective Victor Pietrantoni, not Detective Crews, to present to the jury the crime scene evidence. As Detective Crews did at Petitioner's trial, Detective Pietrantoni testified regarding the evidence of the attack in the living room and hallway. He then gave a detailed explanation of what they found in the Piirisild's bedroom.

In the bedroom, Detective Pietrantoni observed "There was additional blood evidence in the bedroom that would be consistent with additional strikes to the victim in the position that she's now in [on her side with her back apparently resting against the bed]." (Sakarias RT 887.) "As I remember, there was[sic] blood spatters on the ceiling behind or toward her feet and down along the wall, and also there was a blood spatter on a photograph of – a photograph depicting her and her mother that was on the bureau." (Sakarias RT 888.) With regard to the spatter on the photograph, he added, "[I]t appeared to be a blood spatter as consistent with blood being ejected from a source or by a source – I mean, object or a person." (Sakarias RT 888, People's Exhibit 137.)

In referring to other exhibits, Detective Pietrantoni noted the location of blood throughout the bedroom:

*** People's Exhibit 138** showed Detective Pietrantoni pointing to blood spatters on the sliding door to the closet which was located directly behind or directly projecting from the victim's feet. (Sakarias RT 891.)

*** People's Exhibit 139** showed blood spatters visible on the wall behind the victim's head. "What you'll see here if you look closely is[sic] two blood spatters that impacted the wall at one point, **and had enough substance to actually start to trickle down the wall**." (Sakarias RT 893 [emphasis added].)

*** People's Exhibit 140** is a view higher up the same wall that exposes more blood spatters on a painting and on a window curtain. Detective Pietrantoni noted these spatters did not drip because of the absorbent nature of the curtains and painting canvas. (Sakarias RT 894-895.)

*** People's Exhibit 141** shows additional blood spatter on a portion of a window, a window sill as well as the area immediately below the sill which was directly behind the victim's head. This exhibit also depicts to the right of the body the bed where there is blood. (Sakarias RT 902.)

*** People's Exhibits 142-143** both show blood spatter on the bedroom ceiling. (Sakarias RT 903-905.)

Detective Pietrantoni concluded that "[I]f you take everything into consideration, meaning the blood spatters on the wall adjacent to the bed, the

blood spatters along the ceiling and the blood spatters on the closet behind the victim or directly off of her feet . . . they were in a relatively narrow path . . . I would form the opinion . . . that it was some type of arcing motion being demonstrated by the person who was striking the victim, causing the blood to fly off of the weapon." (Sakarias RT 906-907.) He then stated, "[T]o the best of my abilities I would have to say that the arc essentially paralleled directly on top of the victim's body from the front of the bed, or from the headboard area of the bedroom back to the rear of the bedroom where the closet was." (Sakarias RT 907.)

Detective Pietrantoni gave additional testimony regarding the bedroom. "[T]here was a blood drop on the photograph on the bureau, but also at the site where the victim's head was located, which was the impact site, there was blood spattering . . . directly to the sides of the victim's head along a piece of furniture, which would be consistent with a person striking another person on the ground and the blood being projected off the head from impact. It's in a relatively close – in a relative close proximity to the victim's head." (Sakarias RT 908.) Later in his testimony, Detective Pietrantoni discussed blood spatters around the victim's body, on the dresser, on a photograph, and on the bedspread or bed sheet. (Sakarias RT 914.)

Detective Pietrantoni concluded that Mrs. Piirisild received injuries in more than one place. "I myself formed the opinion that she was initially struck shortly after entering the house, and came to rest in the [living room] area that was covered by the rug for a period of probably several minutes. Then based on the other evidence . . . the rug, the way the rug was bent and the path shown by the blood itself would indicate that she was dragged, partially carried from the initial attack site back **into the bedroom where she was attacked again**." (Sakarias RT 909-910 [emphasis added].)

Mr. Ipsen continued to develop the bedroom crime scene evidence with the following exchange of questions and answers with Detective Pietrantoni:

Question: And the physical evidence, or at least one item of physical evidence of that attack in that bedroom would be that arced pattern of blood spatter that you described for the jury?

Pietrantoni: Yes. In and of itself it would be an indication that she was attacked in the bedroom.

Question: Was the pattern of that blood arc – that arced pattern of blood consistent with any additional injuries that you would be able to observe while you observed the body of Mrs. Piirisild on her bedroom floor?

Pietrantoni: Well, it would be consistent with the injuries that she had sustained, yes.

Question: What injuries, to the best of your ability to describe them, were you able to see when observing her body?

Pietrantoni: **Numerous blunt force and hatchet type, or cutting type injuries."**

Question: Where those injuries – what direction were they pointed to with regard to the room? Were they on the bottom of the body on the side, to the top, to the best of your recollection?

Pietrantoni: **Most of the injuries were to the top and the front of the face.**

(Sakarias RT 910 [emphasis added].)

Detective Pietrantoni summarized the bedroom evidence at Mr. Sakarias's trial as follows: "[I]t meant to me that someone struck the victim and she had bled a considerable amount of blood, causing it to splash off of her, off of her body, or from the impact site and hit the adjoining areas of the room." (Sakarias RT 915.)

C. Testimony Of Dr. James Ribe

1. Petitioner's Trial

Los Angeles County Deputy Medical Examiner Dr. James Ribe performed the autopsy on Viivi Piirisild's body. At Petitioner's trial, he testified about her wounds. In addition, he was asked to opine on the origin of an abrasion found on the victim's lower back. Dr. Ribe described it as a "yellow-tan colored superficial abrasion." (RT 1631; People's Exhibit 59-K.) Dr. Ribe explained that it was an abrasion caused after Mrs. Piirisild's death. (RT 1632-1633.) Mr. Ipsen also asked Dr. Ribe how the abrasion occurred.

Question: And an abrasion is caused by what?

Ribe: It's caused by rubbing of the skin against a firm surface.

Question: In – could it be caused by the dragging across a carpeted area, this type of abrasion?

Ribe: Yes.

Question: And that would mean that this portion of the body was in contact with the carpeted area or in that case, if it were a carpeted type area, hypothetically, the area where the abrasion is located would have been in contact with the surface?

Ribe: That certainly could have caused this particular change on the skin, yes.

(RT 1631-1632.)

2. Sakarias's trial

When Dr. Ribe testified at Mr. Sakarias's trial, he was not asked to discuss the postmortem abrasion on the lower portion of the victim's back.

ARGUMENT

III. FALSE ARGUMENT AND EVIDENCE: LEGAL FRAMEWORK

The result of a criminal trial is invalidated where the prosecutor knowingly makes false argument or presents false evidence that could have reasonably affected the jury's decision. (Napue v. Illinois (1959) 360 U.S. 264,

269; see also Giglio v. United States (1972) 405 U.S. 150, 153 [deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with the "rudimentary demands of justice"].)[7]

Reversal is required when a petitioner demonstrates (1) the argument or evidence was false, (2) the prosecutor knew of the falsity, and (3) it was material to petitioner's guilt or punishment. (Napue v. Illinois, supra, 360 U.S. at p. 269; Miller v. Pate (1967) 386 U.S. 1, 7; Pyle v. Kansas (1942) 317 U.S. 213, 216; Mooney v. Holohan (1935) 294 U.S. 103, 112.) "Materiality" means that there is a reasonable probability that the false argument or evidence could have affected the judgment of the jury. (United States v. Bagley (1985) 473 U.S. 667, 679 fn. 9; United States v. Agurs (1976) 427 U.S. 97, 103.) A "reasonable probability" is a probability sufficient to "undermine confidence in the outcome." (United States v. Bagley, supra, 473 U.S. at p. 682.)

[7] Also, under California Penal Code section 1473, a habeas petitioner may seek relief if "False evidence that is substantially material or probative on the issue of guilt or punishment was introduced against [him] at any hearing or trial relating to his incarceration." (Cal. Pen. Code § 1473(b)(1).)

IV. MR. IPSEN'S FALSE ARGUMENT REQUIRES THE REVERSAL OF PETITIONER'S DEATH SENTENCE

The prosecutor violates a defendant's due process rights when he makes false argument based upon his use of false or misleading evidence. (People v. Hill (1998) 17 Cal.4th 800, 824-825. See also Brown v. Borg (9th Cir. 1991) 951 F.2d 1001, 1017 ["The force of a prosecutor's argument can enhance immeasurably the impact of false or inadmissible evidence."].) The Supreme Court has held improprieties committed during closing arguments can, on their own, violate due process. (Chapman v. California (1967) 386 U.S. 18.)

In People v. Hill, the defendant's murder conviction and death sentence were reversed because the prosecutor knowingly presented false argument. The prosecutor misstated the significance of blood found on a knife allegedly used in the crime. The blood was not an exact match with the victim, as she argued, but actually matched approximately one-half of the population. As a result, the prosecutor bolstered her case while weakening the defendant's case. (People v. Hill, supra, 17 Cal.4th at p. 824-825.)

The Hill prosecutor also mischaracterized the 10 inch scar on the surviving victim's chest. She contended that it resulted from the knife attack allegedly perpetrated by the defendant. Actually, the scar was the result of the emergency surgery performed after the stabbing. The prosecutor used the scar

to argue the defendant's intent to kill and successfully turned the jury against him. This Court stated, "A prosecutor's 'vigorous' presentation of facts favorable to his or her side 'does not excuse either deliberate or mistaken misstatements of fact.'" (Id. at p. 823 [citation omitted]. See also Miller v. Pate, supra, 386 U.S. at p. 6 [denouncing the prosecutor's "consistent and repeated misrepresentation" that paint stains found on pair of shorts were blood stains].)

In Brown v. Borg, the prosecutor made false closing arguments after she presented false evidence and argument in a murder case where she alleged that a robbery had occurred when, in fact, she knew no robbery took place. The state court was alerted to this fact after trial and reduced defendant's conviction from first to second degree murder. However, the federal appeals court reversed the conviction itself in habeas proceedings. The court in Brown stated

> The prosecutor's actions in this case are intolerable. Possessed of knowledge that destroyed her theory of the case, the prosecutor had a duty not to mislead the jury. Instead, she kept the facts secret in the face of a long-standing rule of constitutional stature requiring disclosure, and then presented testimony in such a way as to suggest the opposite of what she alone knew to be true . . . . Such conduct perverts the adversarial system and endangers its ability to produce results.

(Brown v. Borg, supra, 951 F.2d at p.1015.) The court found the prosecutor's conduct so outrageous that it reversed the conviction, although the withheld

information only went to the special circumstance, because the other evidence was relatively weak.

Like People v. Hill and Brown v. Borg, Petitioner's case presents a very high level of false argument by Mr. Ipsen. Mr. Ipsen falsely placed the hatchet in Petitioner's hand for **all** the blows delivered while arguing Mr. Sakarias only possessed the knife. (RT 548-549, 2831, 2837, 2840, 2843.)

The prosecution amplified this falsity by making misleading and inconsistent arguments. First, Mr. Ipsen asserted that Petitioner delivered the death blow in the living room with the sharp end of the hatchet which broke open Mrs. Piirisild's skull. (RT 548-549 [Petitioner chopped "past the bone through the skull to a point where the skull, top of the head was able to be lifted off by the coroner . . ."], RT 2831 ("he had with him the hatchet that he would . . . chop the top of her head with . . ."], RT 2837 [Petitioner "turned the hatchet blade so that [he] . . . was now able to chop through the top of her skull . . ."].) The prosecutor now reveals in a declaration that even he believed this scenario was unlikely, as it was Sakarias, not Petitioner, who admitted to hitting Piirisild on the top of the head.

Second, Mr. Ipsen argued falsely when he claimed Mrs. Piirisild was killed in the living room. He argued, "[Mr. Waidla] left her body dead in her home where she had been killed near the front door, and he left her where he

and his accomplice had dragged her 180, 190 pound body, left next to her bed in the bedroom." (RT 548. See also RT 2843 ["[W]e know that she was dead in the front room of her home in her living room."].) This position was contradicted by the ample crime scene evidence showing that the murder occurred in the bedroom -- evidence that the prosecutor presented in detail at Sakarias's trial.

Third, Mr. Ipsen focused the jury's attention on an abrasion on Mrs. Piirisild's lower back to prove that she died in the living room. He asserted, "We know that she did not live to see or to be dragged back into her bedroom, because the coroner testified and told you that the burn mark on her back, as she was dragged, the abrasion on her back was a postmortem, or an after death wound." (RT 2843.) This misstated the coroner's testimony that the bruise on the back was "possibly" caused by her being dragged.

At Petitioner's penalty phase, Mr. Ipsen continued his false argument when he maintained Petitioner exclusively used the hatchet and buried the sharp side of the hatchet into the top of Mrs. Piirisild's skull. "Although he felt her head and her flesh against the back of his hatchet numerous times, **he knew his mission wasn't accomplished, and that's when he changed and switched and used the sharp edge of the hatchet to give that death blow**." (RT 3069-3070 [emphasis added]. See also RT 3057, 3059, 3065-3066.)

Mr. Ipsen's guilt and penalty phase arguments were false. Mr. Ipsen knew his arguments were false based on Mr. Sakarias's confession in which Sakarias admitted he repeatedly stabbed her and used the hatchet to deliver the blows to the top of the head.[8] In fact, Mr. Sakarias's letter exonerates Petitioner from any involvement aside from the initial blow he acknowledged he delivered.

Mr. Ipsen's false arguments altered the outcome of Petitioner's penalty phase. By falsely attributing **all** of the hatchet blows to Petitioner, Mr. Ipsen made sure the jury sentenced Petitioner to death. First, the vast number of hatchet blows and the force of the skull-shattering chop indicated an intent to kill Mrs. Piirisild.[9] Second, the number of blows to the head, especially the

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[8] Respondent contends in her Return that Mr. Ipsen was not thinking about Mr. Sakarias's confession because it would have been inadmissible hearsay if offered at Petitioner's trial. (Return, at p. 21 fn. 6.) The contention lacks merit. The Sakarias confession was admissible as a co-perpetrator's statement against interest. (Chambers v. Mississippi (1973) 410 U.S. 284.) More importantly, the admissibility of certain evidence does not excuse a prosecutor from lying about the facts known to him.

In addition, even if it was not admissible at Petitioner's trial, it provided exculpatory information that Mr. Ipsen had an obligation to turn over with or without a request from the defense. (United States v. Bagley, supra, 473 U.S. at p. 682; United States v. Agurs, supra, 427 U.S. at p. 107; Brady v. Maryland (1963) 373 U. S. 83, 87; In re Brown (1998) 17 Cal.4th 873, 879.)

[9] In her Return, Respondent wrongly asserts that Petitioner admitted to "administering the blunt force impacts that contributed to the victim's death." (Return, at p. 25.) Respondent provides no citation for this claim. Based on Petitioner's custodial statement, he admitted to delivering one blow before Mr.

sharp-edged blows, wrongly painted the picture of Petitioner's involvement in the crime. Third, Mr. Ipsen argued that Petitioner was the dominant participant.[10] Fourth, such a compelling prosecution case, albeit one based on false arguments and misleading evidence, must have influenced the defense's decision to try to win the case outright with a theory that the defendant was not in California when the murder occurred. If the complete facts were presented, the defense could have explained to the jury Petitioner's limited role in the attack and how he stopped after he hit Piirisild once with the blunt end of the hatchet.

In conclusion, the dramatic images of the damage wrought upon Mrs. Piirisild's head and face by the hatchet attack were wrongly attributed to Petitioner. These arguments were false, Mr. Ipsen knew they were false, and they were material. Therefore, a penalty phase reversal is necessary in this case. Moreover, Petitioner now presents evidence exonerating him from the crimes for which he was convicted and sentenced to death.

Sakarias stabbed and hatcheted Mrs. Piirisild to death.

[10] At Petitioner's trial, Mr. Ipsen argued that Petitioner always used the hatchet, which was "the more devastating" of the two instruments used. Also, he referred to the knife used by Mr. Sakarias as the "lesser implement." (RT 2840.) Throughout the trial, Mr. Ipsen referred to Mr. Sakarias as Petitioner's "accomplice." (RT 544, 545, 548, 549, 2177, 2842.)

V. MR. IPSEN VIOLATED PETITIONER'S DUE PROCESS RIGHTS WHEN HE PRESENTED SELECTIVE AND MISLEADING FORENSIC EVIDENCE AND TESTIMONY FROM THREE IMPORTANT PROSECUTION WITNESSES

A. Mr. Ipsen Committed Reversible Error When He Elicited Misleading Testimony From Detective Crews And Criminalist Johnson

If a jury has been given a false impression of the facts because the selected crime scene evidence and testimony were misleading, then actual falsity does not need to be shown to prove a due process violation. People v. Westmoreland (Cal. App. 5th Dist. 1976) 58 Cal.App.3d 21, 42 [citing Alcorta v. Texas (1957) 355 U.S. 28, 31]. See also People v. Stuart (Cal. App. 3rd Dist. 1969) 272 Cal.App.2d 653, 655 [Case presented to jury based "upon partial evidence which, by reason of the false inferences created, became false evidence . . . . [Therefore, a] trial upon false evidence is no trial at all."]; United States v. Barham (5th Cir. 1979) 595 F.2d 231, 242 ["[T]he defendant is entitled to a jury that is not laboring under a Government-sanctioned false impression of material evidence . . ."].)

In People v. Stuart, the court held that the trial was unfair because after

it reviewed the entire record of both the pretrial hearing and the trial, it noted that "the evidence elicited from and obtained from these witnesses was vastly different." The court concluded that the prosecutor deliberately distorted the evidence. (People v. Stuart, supra, 272 Cal.App.2d at p. 655.)

Just as the courts noted in Westmoreland, Stuart, and Barham, Mr. Ipsen's selective use of crime scene evidence at Petitioner's trial was intentionally misleading and violated Petitioner's due process rights.

Mr. Ipsen failed to correct the misleading testimony of L.A.P.D. Detective David Crews and L.A.P.D. Criminalist Susan Johnson when each omitted any reference to the physical evidence of the hatchet attack in the bedroom. Detective Crews was specifically asked by Mr. Ipsen to describe the entire crime scene. (RT 1953-2007.) Likewise, Ms. Johnson omitted from her testimony any reference to blood spatter in the bedroom. (RT 1793-1849.)

It is noteworthy that at Mr. Sakarias's trial, Detective Victor Pietrantoni, who was co-lead investigator with Detective Crews on the Piirisild homicide case, gave testimony of the crime scene that included extremely detailed testimony of the blood spatter in the bedroom. (Sakarias RT 885-916; People's Exhibits 137-143.) In fact, Detective Pietrantoni testified that the bedroom evidence was significant because it indicated Mrs. Piirisild suffered

"[n]umerous blunt force and hatchet type, or cutting type injuries" to the head in that room. (Sakarias RT 910.)

Mr. Ipsen knew that Mr. Sakarias alone perpetrated the deadly hatchet attack upon Mrs. Piirisild in her bedroom. While Mr. Ipsen contends in his declaration filed with Respondent's Return that "I did not intentionally present any inconsistent evidence or argument to either jury[,] . . ." the statement is not born out by the record, which demonstrates a purposeful selection of crime scene evidence. (Return, Exhibit A at para. 2.) Furthermore, Mr. Ipsen now admits that he formed the opinion that Mr. Sakarias probably did use the hatchet to break open Mrs. Piirisild's skull. In his declaration, Mr. Ipsen states, "At the time I prosecuted Sakarias, I had a good faith belief that Sakarias inflicted all three chopping wounds since Sakarias had admitted responsibility for two of the wounds and it was logical to infer whoever inflicted two of the chopping wounds probably inflicted all three." (Return, Exhibit A at para. 5.)[11] At Petitioner's trial, however, Mr. Ipsen ignored Mr. Sakarias's statement and called Petitioner a liar when he told the police that Sakarias killed Mrs. Piirisild with the hatchet in the bedroom. (RT 3065-3066.)

[11] Mr. Ipsen argued at Mr. Sakarias's trial that "We know that there were three, in this series of blows, sharp hatchet wounds to the top of Viivi's head with a tremendous force." (Sakarias RT 1520.)

The misleading evidence Mr. Ipsen presented at Petitioner's trial was material to the penalty phase because Petitioner's custodial statement was heard by the jury. (RT 2313-2314; People's Exhibit 134.) In his statement, Petitioner said that Mr. Sakarias was the one who attacked Mrs. Piirisild in the bedroom. The omitted bedroom crime scene evidence would have corroborated Petitioner's statement – a statement that Ipsen told the jury was a lie.

B. Mr. Ipsen Committed Reversible Error When He Elicited False Or Misleading Testimony From Dr. Ribe

Expert testimony is material to both the guilt and penalty phases when it is knowingly false or misleading and a prosecutor fails to correct such testimony. (Miller v. Pate, supra, 386 U.S. at p. 8. See also People v. Seaton (2001)
26 Cal.4th 598, 649 ["If the prosecution becomes aware of information that casts doubt on the accuracy of the testimony of one of its expert witnesses, it must disclose that evidence if it is material."].)

Similarly, "A prosecutor who, before trial, seriously doubts the accuracy of an expert witness's testimony should not present that evidence to a jury, especially in a capital case." (Id. at 650. See also In re Garcia (Cal. App. 4th Dist. 1993)17 Cal.App.4th 1169 [habeas writ granted because prosecutor

withheld impeachment evidence that his expert witness had used faulty methodology and made errors in other cases].)

It is reversible error even when the expert witness does not know his testimony is false or misleading but the prosecutor uses such testimony to support his false theory of the case. Such testimony is reversible error because due process demands that, in addition to prohibiting convictions obtained through perjured testimony being used by a prosecutor, "**outright falsity need not be shown if the testimony taken as a whole gave the jury a false impression**." (People v. Westmoreland, supra, 58 Cal.App.3d at p. 42 [emphasis added].)

VI. MR. IPSEN'S PRESENTATION OF FACTS INCONSISTENT WITH THOSE PRESENTED AT MR. SAKARIAS'S TRIAL VIOLATED DUE PROCESS AND NECESSITATE REVERSAL OF PETITIONER'S CONVICTION AND DEATH SENTENCE

A. When The Inconsistent Facts Presented At Separate Trials Prove Mr. Ipsen Presented False Argument And Misleading Evidence, Petitioner's Conviction And Death Sentence Must Be Reversed

If a prosecutor presents inconsistent facts at related trials and those facts demonstrate the prosecutor withheld material evidence from the defendant, then the defendant's conviction must fall. (Thompson v. Calderon (9th Cir. 1997) (en banc) 120 F.3d 1045, 1057, rev'd on other grounds, (1998) 523 U. S. 538.)

In Thompson, the Ninth Circuit addressed inconsistent factual presentations in two murder trials and found Thompson's due process rights were violated. Thompson was tried first. The prosecutor argued that he acted alone when he murdered a woman to cover up a rape. At the second trial, the prosecutor argued that codefendant Leitch was an active participant in the murder because he wanted the his girlfriend dead so she would not get in the way of him reconciling with his ex-wife. The prosecutor relied on different informants at each trial to obtain convictions. The court stated that due process

was violated where the prosecutor "manipulated evidence and witnesses, argued inconsistent motives, and at Leitch's trial essentially ridiculed the theory he had used to obtain a conviction and death sentence at Thompson's trial." (Ibid. C.f. Nguyen v. Lindsey (9th Cir. 2000) 232 F.3d 1236, 1240 [no violation found where arguments were consistent with evidence presented and prosecutor **had not falsified evidence or engaged in bad faith**]; United States v. Sharpe (5th Cir. 1999) 193 F.3d 852, 872 [no due process violation because the state found **new evidence**].)

Like the prosecutor in Thompson, Mr. Ipsen repudiated his factual presentation at Petitioner's trial when he presented different the crime scene evidence at Mr. Sakarias's trial. As Petitioner set forth in the false argument and misleading evidence sections, Mr. Ipsen did manipulate evidence and witnesses at Petitioner's trial.

Unlike the cases of Nguyen and Sharpe, Petitioner's case does demonstrate prosecutorial bad faith in the inconsistent arguments. Here, Mr. Ipsen did argue falsely that Petitioner delivered all of the hatchet blows. Plus he only presented selected crime scene evidence to Petitioner's jury. Unlike Sharpe, where the different presentations were due to new evidence being discovered in between trials, here the inconsistent factual presentations were due to a conscious effort by Mr. Ipsen to shift responsibility at the two trials.

B. The Presentation Of Inconsistent Facts Undermines Confidence In The Criminal Trial Process

When a prosecutor manipulates evidence, he lowers public confidence that the government is obeying its mandate to seek justice. (United States v. Agurs, supra, 427 U.S. at pp. 110-111; Brady v. Maryland, supra, 373 U.S. at p. 88; In re Ferguson (1971) 5 Cal.3d 525, 531.)

This Court has noted that the prosecutor's "duty is not to obtain convictions, but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands trial." It added, "The search for truth is not served but hindered by the concealment of relevant and material evidence." (In re Ferguson, supra, 5 Cal.3d at p. 531.)

In a case where the prosecutor improperly argued facts that were unsupported by the evidence, the court granted relief because "The integrity of the judicial system commands that citizens can rest assured that prosecutors are seeking truth and justice; and that when they find truth and justice they cannot seek a different truth and justice from the first." (Nichols v. Collins (S.D. Tex. 1992) 802 F.Supp. 66, 74.)

In Drake v. Kemp, the 11th Circuit granted habeas relief on another claim and failed to reach the merits of the due process claim. However, Judge Clark filed a special concurrence in which he discussed the importance of prosecutors

fairly presenting evidence at separate trials. He stated that a divide and conquer approach on the part of the prosecutor reduces trials to mere gamesmanship not a search for the truth. In that case, the codefendant gave a sworn recantation. (Drake v. Kemp (11th Cir. 1985) (en banc) 762 F.2d 1449, 1479.)

Lastly, in capital cases the prosecutor's responsibility is even greater to avoid inconsistent factual presentations because there is a "heightened need for reliability." (Caldwell v. Mississippi (1985) 472 U.S. 320, 323.)

In Petitioner's case, it is clear that Mr. Ipsen lost sight of his duties as a public servant in order to secure a conviction and death sentence. His willingness to present false argument and partial and misleading evidence at Petitioner's trial while permitting Mr. Sakarias's jury to pass judgment based on **all** the evidence subverted Mr. Ipsen's duty to seek justice.[12] In addition, Mr. Sakarias has now exonerated Petitioner, as did the codefendant in Drake v. Kemp.

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[12] There is a growing body of literature regarding a prosecutor's duties and that inconsistent factual presentations and argument violate due process. (See Anne Bowen Poulin, Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight (2001) 89 Cal. L. Rev. 1423 [arguing that the prosecutor should be prevented from exploiting inconsistent positions in separate proceedings on due process grounds]; Steven F. Shatz & Lazuli M. Whitt The California Death Penalty: Prosecutors' Use of Inconsistent Theories Plays Fast and Loose with the Courts and the Defendants (2002) 36 U.S.F. L. Rev. 853 [same]; Kenneth M. Miller, Combating the Prosecutor's Improper Utilization of Inconsistent Theories (June 2002) The Champion, at p. 16 [same].)

For all of the reasons set forth above, Petitioner's conviction and death sentence must be reversed.

ORDER TO SHOW CAUSE
QUESTION TWO:

Miranda claims are cognizable on habeas corpus.

Respondent argues that the Court should establish a per se rule preventing petitioners from raising claims based on a violation of Miranda v. Arizona, (1966) 384 U.S. 436, on habeas corpus. Respondent does not argue that Miranda violations are not cognizable in this Court. Rather, the only issue in dispute is **when** they may be presented to this Court – on direct appeal or habeas. First, Respondent argues that Miranda claims are record based, and that therefore they are properly adjudicated only on direct appeal. (See Return, at pp. 26-27.) Second, Respondent contends that public policy, in particular the state's interest in the finality of judgments, supports a per se bar on Miranda claims in habeas corpus. (See id. at pp. 27-28.)

This Court has already established thorough rules regarding when a claim may be raised on habeas corpus, and when it is confined to direct appeal. (See generally, In re Harris (1993) 5 Cal.4th 813, 824-29.) Specifically, if a claim was fully raised and rejected on direct appeal, it may not subsequently be re-

litigated in habeas corpus proceedings. (See Harris, supra, 5 Cal.4th at p. 825 [citing In re Waltreus (1965) 62 Cal.2d 218].) Also, if a claim could have been fully raised on direct appeal, it may not be raised instead during habeas corpus. (See Harris, supra, 5 Cal.4th at p. 829 [citing In re Dixon (1953) 41 Cal.2d 756].)

These rules are sufficient to guide the presentation of habeas claims in this Court, and should be applied by this Court on a case by case basis to determine whether a Miranda claim may be heard in any particular instance. In this case, Petitioner concedes that his First Claim for Relief was already presented and decided on direct appeal, and that he has presented nothing new – in other words that he has presented no evidence outside the record to support his claim on habeas corpus. The claim was included in Petitioner's habeas petition for the purpose of giving context to other claims in this petition (such as Petitioner's claims of ineffective assistance of counsel), and in order to provide the Court with a description of the totality of error that occurred during Petitioner's trial.

The possibility that Petitioner's claim might be barred in this particular case is not a compelling reason to bar **all** Miranda claims brought by **all** habeas petitioners, even if a petitioner **can** present evidence outside the record that could not have been presented on direct appeal. The Court's current Waltreus

and Dixon rules are sufficient to decide the issue in this case, and in all others. A per se rule would risk eliminating meritorious claims that are based on evidence outside the record and that are therefore appropriately brought under the Court's current rules. Respondent's conclusory assertion that such claims should be barred because of finality concerns amounts to an argument that Miranda violations should not be addressed, even if they can be proven, when the evidence necessary to prove the violation is not in the trial court record.

Habeas corpus is a vehicle for redressing violations of fundamental constitutional rights. (See Harris, supra, at p. 825.) Whether a defendant's Miranda rights have been violated is not, as Respondent argues, merely an evidentiary question. The United States Supreme Court has held that Miranda . . . protect[s] a defendant's Fifth Amendment privilege against self-incrimination . . . and "safeguards 'a fundamental **trial** right.'" (Withrow v. Williams (1993) 507 U.S. 680, 691 [emphasis in original] [internal citations omitted]; see also, Dickerson v. United States (2000) 530 U.S. 428, 444 ["Miranda announced a constitutional rule."].) Accordingly, habeas corpus relief should remain available for Miranda claims that meet the procedural requirements of Dixon and Waltreus.

CONCLUSION

For all the reasons set forth above, in the Petition, and in Petitioner's Reply to Informal Response to Petition for Writ of Habeas Corpus, Petitioner respectfully requests that this Court grant his Petition for Writ of Habeas Corpus.

Respectfully submitted,

MARIA E. STRATTON
Federal Public Defender

DATED: November __, 2002 By: _____
SCOTT T. JOHNSON
LAWRENCE B. BERROYA
Deputy Federal Public Defenders

Attorneys for Petitioner
TAUNO WAIDLA

PROOF OF SERVICE

I, the undersigned, declare that I am a resident or employed in Los Angeles County, California; that my business address is the Federal Public Defender's Office, 321 East 2nd Street, Los Angeles, California 90012; that I am over the age of eighteen years; that I am not a party to the action entitled below; that I am employed by the Federal Public Defender for the Central District of California, who is a member of the Bar of the State of California, and at whose direction I served a copy of the attached PETITIONER'S TRAVERSE TO RESPONDENT'S RETURN TO THE PETITION FOR WRIT OF HABEAS CORPUS on the following by placing it in a sealed envelope for collection and mailing via the United States Post Office, addressed as follows:

Michael C. Keller,
Deputy Attorney General
for the State of California
Department of Justice
300 South Spring Street
6th Floor, North Tower
Los Angeles, California 90013

Tauno Waidla
CDC No. E-88500
San Quentin State Prison
San Quentin, California 94974

This proof of service is executed at Los Angeles, California, on November __, 2002. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

–

Concepcion M. Zambrano

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